No. 2587

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ROSE BRIGHT, et al.,

Plaintiff in Error,

vs.

VIRGINIA AND GOLD HILL WATER COMPANY, a Corporation,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

CHENEY, DOWNER, PRICE & HAWKINS,
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Brief for Defendant in Error.

This is an action at law for the recovery of money only as damages for the violation of an alleged oral agreement. The defendant demurred to the plaintiffs' third amended complaint upon several grounds. One ground of the demurrer only was considered by the Court, namely, that the complaint did not state facts sufficient to constitute a cause of action, and the demurrer was sustained upon that ground. The plaintiffs declined to further amend and judgment was entered for the defendant. If the action of the Court in sustaining the demurrer was right for any reason, the judgment should be affirmed.

The claim of the plaintiffs as shown by the said complaint is in substance as follows: That about 40 years ago, defendant permitted certain waste and overflow waters to escape and run down upon certain lands of the plaintiffs' grantor, Joe Garavanta, in such a way as to cause injury thereto; that Garavanta threatened to sue for the damages so caused, and in consequence of the relinquishment of said claim, Garavanta and the defendant agreed by parol that Garavanta would permit said waste and overflow waters to run over and across his lands, and that said defendant gave Garavanta the right to use said waste and overflow waters in the cultivation and irrigation of his said lands. It is further alleged that relying upon said agreement, the plaintiffs and their grantor made improvements upon said lands, with the knowledge of the defendant, and that on the 24th day of June, 1913, the defendant cut off, diverted and stopped the overflow waters and thereby deprived the plaintiffs of the use thereof with the result that the crops growing upon their property were damaged by reason of the loss of said water.

The plaintiffs having thrice amended their complaint, it is but fair to presume that they have now stated their cause of action in the strongest manner which the facts will justify

AMBIGUOUS AND UNCERTAIN AVERMENTS SHOULD BE CONSTRUED MOST STRONGLY AGAINST THE PLAINTIFFS.

> "A complaint being tested by a demurrer should be construed most strongly against the pleader."

Cambers v. First National Bank of Butte, 144 Fed. 717; 156 Fed. 482.

"The provision of the Code of Civil Procedure, requiring that the allegations of pleading shall be literally construed, applies only to matters of form. It is still the duty of a party to present a clear and unequivocal statement of his cause of action or defense, and when a material statement is susceptible of two meanings, the one most unfavorable to the pleader must be taken."

Clark v. Dillon, 97 N. Y. 370.

Mallinckrodt Chem. Works v. Nemnich, 69 S. W. 355-8.

Atkins v. Kattman, 97 N. E. 174.

The Supreme Court of California, in an action where a plaintiff had three opportunities to make a good complaint and then failed, said:

"The failure to make a good pleading probably arises in the lack of facts, rather than in the fault of the pleader."

Dukes v. Kellog, 60 Pac. 44.

"The plaintiff undertook to plead all of the circumstances of the transaction, apparently in anticipation of any defense which might be available to the defendant. He is bound by the facts pleaded in his complaint; and, as it is apparent upon the face of the complaint, that those facts do not and cannot be made to state a cause of action upon a completed and valid contract, the demurrer was correctly sustained, without leave to amend."

Burki v. Pleasanton School Dist., 123 Pac. 546, 548.

Before the plaintiffs can maintain any action, it must appear that there was a valid and legal agreement which obligated the defendant to deliver to the plaintiffs the said waste and overflow waters at the time it was alleged they were deprived thereof by the defendants, and that the plaintiffs have broken that agreement; or that although the plaintiffs had no **legal** agreement which entitled them to the water claimed, yet by reason of the acts and conduct of the parties, equity will convert the invalid parol agreement into a license, which defendant can only revoke upon reasonable notice, which was not given; or a license which is irrevocable.

THE ALLEGED AGREEMENT IS NOT ENFORCIBLE.

The alleged agreement which plaintiffs seek to establish, and, then to enforce, relates to and is of and concerning lands; it is not a lease for any term whatever; it is not in writing, but it is alleged to be an oral agreement; it is not by its terms to be performed within one year from the making thereof, but on the contrary, it was for an indefinite time. Therefore the alleged agreement, if made, is void and in contravention of the Statute of Frauds of Nevada, being sections 1069 and 1075, 1 Revised Laws of Nevada.

> "Sec. 1069. Statute of Frauds—Lease for one year.
>
> "Sec. 55. No estate, or interest in lands, other than for leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall

hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance, in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized in writing."

"Sec. 1075. Statute of Frauds—Agreements not in writing, when void.

"Sec. 61. In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party charged therewith: First, every agreement that, by the terms, is not to be performed within one year from the making thereof; second, every special promise to answer for the debt, default, or miscarriage of another; third, every promise or undertaking made upon consideration of marriage, except mutual promises to marry."

While a parol agreement within the Statutes of Fraud may be a justification for what has been done under it, yet it is the general rule "that no action can be brought to charge the defendant **in any way** upon his verbal agreement not put in writing according to the statute."

Brown on Statute of Frauds, Sec. 134.

"No action at law can be maintained to recover damages for its breach."

2 Page on Cont. Sec. 740.

That the alleged agreement is void because in contravention of said sections of the statute, is

the second and third grounds of defendant's demurrer to said third amended complaint. (Trans. pp. 10-11.)

THE DEFENDANT HAS NOT BROKEN THE ALLEGED AGREEMENT

It clearly appears from the third amended complaint that the water referred to, and which constituted the subject matter of the agreement, was the "overflow and waste water" from the flume of the defendant. It was the "overflow" of the waters which it is alleged ran down and across the premises, causing damages for which plaintiffs' grantor threatened suit. It was the "overflow waters" which the said grantor agreed to permit to flow down and across his lands. It was the "overflow waters" that the said Joe Garavanta and his successors in interest had a right to use, without interference by the defendant, for the irrigation of said lands, and the right of way which the said Joe Garavanta gave and granted to the defendant was for "the said overflow and waste waters from the works of said defendant to run down said natural channel and ravine." (Trans. p. 5.)

The act of the defendant of which complaint is made, is that it "cut-off, diverted and stopped the said overflow of waters." (Trans. p. 8.)

The amount of said waste and overflow waters or the use made of them by the plaintiffs, or their grantor, throws no light upon the vital question, whether the defendant had agreed to create at all times any overflow or waste waters whatever. It is the contention of the defendant in error that the

alleged agreement, as stated, is nothing more than that the defendant agreed with the grantor of the plaintiffs that if he did not prosecute his said suit for damages, he might have the use, without interference from the defendant, of whatever waste and overflow water there was after it left the works of the defendant. It was not claimed upon the argument of the demurrer that the defendant had in any way interfered with any waste or overflow water after it left defendant's flume. It was conceded upon the argument of the demurrer that the effect of plaintiff's allegations are, that the only way defendant had interferred with any overflow or waste water, is that it had failed to divert into its flumes and works a sufficient amount of water to create any overflow or waste water. The allegations of the complaint were so understood by the Court. (Trans. p. 18.)

For one party to agree with another that he may have whatever overflow and waste water there is from his premises, is quite different from agreeing that he will maintain or continue the flow of any waste water whatever. If there was in fact waste and overflow water which the defendant diverted after it became waste or overflow water, such a diversion might constitute a violation of the agreement stated, but as it is conceded that the act complained of is that the defendant prevented there being any overflow by not diverting into its flumes enough water to cause the water to waste or overflow, the District Court very properly held, upon that ground, that the complaint did not state a cause of action.

As soon as any of the water which the defendant diverted into its flumes became overflow or waste

water, the plaintiff's title or right thereto ended.

It has been held by the Supreme Court of Nevada that as soon as this defendant discharged water from its flume, it became abandoned water and the lease by this defendant of those waters gave the lessee no right thereto.

Schulz v. Sweeney, 19 Nev. 359-360.

DOUBTFUL AVERMENTS WILL NOT BE SO CONSTRUED AS TO MAKE AN UNREASONABLE OR IMPROBABLE AGREEMENT.

It is the theory of plaintiffs' complaint that their lands were improved and cultivated and made valuable by the use of water thereon for 40 years, the right to which they obtained by reason of the alleged agreement. These lands, therefore, could have been of no considerable value at the time Joe Garavanta threatened to sue defendant for damages caused by their overflow, and no considerable damage could have been caused thereby. It will not be presumed that parties enter into improbable or unreasonable agreements, having in view the surrounding circumstances.

> "Where the language of a contract is obscure or ambiguous, or its meaning is doubtful, so that it is susceptible of two constructions, that interpretation which evolves the more usual, reasonable, and probable contract should be adopted."
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> Pressed Steel Car Co. v. Eastern Ry. Co., 121 Fed. 609.
>
> Bell v. Bruen, 1 How. 169, 186.
>
> Coglan v. Stetson, 19 Fed. 727, 729.
>
> Jacobs v. Spalding, 71 Wis. 177, 186; 36 N. W. 608.

Russell v. Allerton, 108 N. Y. 288, 292; 15 N. E. 391.

It is not reasonable to suppose that the defendant corporation, which was engaged in furnishing water to Virginia City and which might at any time have a demand for all or more than it could supply, would, in settlement of the trivial damages for which it might be liable under the claim made by Joe Garavanta, have obligated itself to create or furnish at any time any waste water, and especially is it unreasonable and improbable that the defendant agreed to continue an overflow which the plaintiffs say was sufficient to irrigate 100 acres of land. Before any such contract should be declared, it should be alleged in the most unequivocal terms, and the allegations of the complaint being ambiguous, they should be construed as intending to mean, and as the District Court understood that it did mean, that the defendant only agreed to the plaintiffs' use of such waste or overflow water as might escape from its flume—not to create or continue an overflow.

The continued use of waste water creates no right to have the discharge continued.

> "The better authorities hold that a claimant to waste water acquires a temporary right only to whatever water escapes from the works or lands of others, and which cannot find its way back to the natural stream from which it was taken; that such a use of the water does not carry with it the right to any specific quantity of water, nor the right to interfere with the water flowing in the ditches or works of others lawfully appropriating it, that the appropria-

tors are under no obligation, nor have they the right to permit any specific quantity of water to be discharged as 'waste water' for his benefit."

2 Kinney on Iirrigation & Water Rights, 2 Ed. 1153.

Cardelli v. Comstock Tunnel Co., 26 Nev. 284.

THE FACTS STATED DO NOT CREATE A LICENSE.

We understand it to be the plaintiffs' contention that the defendant has given them a license to use the water of which it has been deprived, which license might be revoked but could only be revoked upon reasonable notice. It is the defendant's contention that the right, if any, to the use of the overflow and waste waters which the plaintiffs acquired under said agreement is not a license.

The term "license" as used in respect to rights in real property, has a fixed and uniform meaning. It is,

"An authority to do a particular act or series of acts upon the land of another without possessing any estate therein."

25 Cyc. 640.

Bouvier's Law Dictionary, "License."

Anderson's Law Dictionary, "License."

The fundamental feature of a license is that it gives the licensee the right to do something not upon his own land, **but upon the land of the licensor.** Under the facts pleaded, the plaintiffs' grantor gave the defendant a license, to-wit, a certain right of way for waste water across his lands. The plaintiffs only acquired a right to take and use

upon their own lands certain waters which flowed to them.

Neither the plaintiffs nor their grantor acquired any license, because they have no right whatever to enter upon any of the lands of the defendant or do any act thereon whatever.

The plaintiffs admit that the so-called license which they claim, was revocable, and say,

> "No doubt the license can be revoked, but we claim it cannot be revoked until such time as the natural term of its continuance for the purpose of raising this year's crop has ended."
>
> Brief, p. 4.

Where improvements have been made upon the lands of another, relying upon a revocable license, the courts have sometimes held that notice of revocation is required. The only purpose of this notice is to enable the licensee to remove the improvements which he has placed upon the lands of the licensor.

> "Where a licensee has movable property on the premises, he should be given reasonable notice of a revocation of the license and an opportunity to remove it. But where the termination of the license necessitates no removal of property, no notice is necessary."
>
> 25 Cyc. 652.
>
> Archer v. C. M. & St. P. Ry. Co. (Mont.) 108 Pac. 571.
>
> Profile Cotton Mills v. Calhoun W. Co. (Ala.) 66 So. 51.

The rule, in some jurisdictions, that notice and

a reasonable opportunity to remove improvements from the lands of another are necessary, before the license can be revoked, is here mentioned for the purpose of emphasizing the fundamental proposition relating to licenses; namely—that it is a permission to do something upon the lands of another, and to make it manifest that in the present case, plaintiffs have no license whatever, have nothing to remove from the defendant's lands, and consequently are not entitled to any notice of its revocation.

We do not care to discuss, because it is not involved in this case, whether a burden or interest in land can be created by acts done under an oral agreement, which is void under the Statute of Frauds The conflict of authorities upon this proposition seems hopeless, but it is believed that the better doctrine is that a parol license can never impose an irrevocable burden on land because as soon as the burden is established, it becomes an estate or an easement, which is an interest of a higher grade than a license, and can only be created by an instrument in writing, and it is noteworthy that several of the States which departed from that doctrine have returned to correct principals in their later decisions.

Note, 49 L. R. A. 526.

PLAINTIFFS' AUTHORITIES ARE NOT APPLICABLE.

Each of the cases on which plaintiffs rely is clearly a case of a license. In Lee v. McLeod, 12 Nev. 281, the license consisted in the construction of a dam and digging of a ditch upon the lands of

the defendant by which water was diverted for the plaintiff.

Flick v. Bell, 42 Pac. 813, was a suit for injunction to enjoin the removal of pipes and a reservoir constructed by plaintiff on defendant's land.

In Rerick v. Kern, 4 S. & R. 267; 16 Am. Dec. 497, the plaintiff had built a dam on the lands of the defendant to divert waters for a saw mill.

In Stoner v. Zucker, 148 Cal. 156; 83 Pac. 808, the defendant had given the plaintiff permission to enter upon his land and construct a ditch for irrigating purposes.

In Curtis v. La Grande Water Company, 23 Pac. 809, the plaintiff had built a dam and laid pipes upon the lands of the defendant.

It is submitted that these authorities have no application whatever to the present case, because, in the case at bar, it is not shown that the plaintiffs claim any right to enter upon the lands of the defendant or that they have made any improvements whatever upon the defendant's lands or that any license so to do was ever given

THE COMPLAINT IS INDEFINITE AND UNCERTAIN.

It is a distinct ground of the special demurrer that the complaint is indefinite and uncertain, as to the time when the alleged agreement between Joe Garavanta and the defendant was made. (Transcript p. 11.) This is a personal action for the recovery of damages.

"In personal actions the pleading must allege

the time, that is, the day, month, and year when each traversable fact occurred."

Andrews' Stephens Pleading, Sec. 194.

Ames v. Nostrum, 125 Pac. 120.

Andrews v. Taylor, 40 Conn. 157.

IN ACTIONS AT LAW EQUITABLE RIGHTS CANNOT BE CONSIDERED.

In this action at law, the legal rights of the parties prevail. The plaintiffs seeming excuse for bringing this action is that they were compelled to sue at law because at law they have a complete remedy. (Plaintiffs' Brief pp. 4-5.). The defendant's objection is, not that the plaintiffs have sued at law, but that they are attempting to maintain an action at law upon purely equitable grounds. This is one of the grounds of defendant's demurrer. (Transcript p. 12.)

In this court and in this action, equitable considerations are not available.

"Equitable causes and defenses are not available in actions at law, because they invoke the judgment and appeal to the conscience of the chancellor, and the free exercise of that judgment and conscience is forbidden in actions at law by the rule which entitles either party to a trial of all the isues of fact by a jury. In the federal courts an action at law cannot be maintained in equity, **nor is an equitable cause of action** or an equitable defense **available at law.**"

Highland Boy G. M. Co. v. Strickley, 116 Fed. 852, 853-4.

Courtney v. Pradt, 160 Fed. 561-2.

McKemy v. Supreme Lodge, A. O. U. W. 180 Fed. 961.

"At law a license could not have the effect to create an interest in lands upon the theory of becoming irrevocable by estoppel, as courts of law deal with the legal aspect of estates in lands, and cannot enforce equities which grow out of an equitable estoppel against the owner of land."

Curtis v. La Grande W. Co. (Ore.) 23 Pac. 809-810.

Wheaton v. Cutler (Vt.), 79 Atl. 1901-1905.

Baynard v. Every Evening Printing Co. (Del.) 77 Atl. 885.

St. Louis National Stock Yards v. Wiggins Ferry Co. 102 Ill. 514.

The plaintiffs plead an invalid oral agreement. They seek to recover damages, not because the agreement is enforcible, but for the reason, as they claim, that under that agreement they have made expenditures and improvements under such circumstances that it is inequitable and unjust that the defendant should not perform the alleged agreement. The moment that they allege that they are entitled to recover in this action, not because of any legal right, but because of alleged equitable considerations, that moment they state themselves out of court. We have heretofore shown that the facts pleaded constitute no ground for relief in equity, and the plaintiffs' complaint not stating either a cause of action at law or in equity, surely the judgment should be affirmed.

It is respectfully submitted that the defendant's demurrer to the plaintiffs' third amended complaint is well taken upon each of the grounds herein stated, and that the judgment of the court sustaining said demurrer should be affirmed.

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